C-20

RIN 1901-AB21

Overview

The proposed rules should be consistent with the underlying statute (Energy Policy Act of 2005) and advance the President's Advanced Energy Initiative published in February 2006. Certain aspects of the proposed rules appear inconsistent with one or both. Our comments are narrowly focused and therefore are not designed to address every detail included in the proposed regulation.

§609.2 Definitions.

Conditional Commitment – "A Conditional Commitment imposes no obligation on the Secretary to execute the Loan Guarantee Agreement."

COMMENT: It would seem that if the Applicant fulfills the terms of the Conditional Commitment that the Secretary would in fact have an obligation to execute the Loan Guarantee Agreement. Otherwise, the Conditional Commitment is neither.

Guaranteed Obligation – "....guarantees any part of the payment of principal and interest..."

COMMENT: Delete "any part of", so that the section would read "....guarantees the payment of principal and interest.....".

This gets to the meaning of "Full Faith and Credit" which is well established in statute and in numerous U.S. Attorney General opinions. For example, Attorney General Elliott L. Richardson's issued a Memorandum to the Heads of Executive Departments dated October 10, 1973[1] in which he memorializes the Attorney General's opinion on the meaning of "full faith and credit of the United States". The third sentence reads, "More frequently, however, the pledge of full faith and credit is not in doubt and may well be specified in the statute itself." This is the fact in the instant case where Title XVII, §1702(j) reads:

> (j) FULL FAITH AND CREDIT.—The full faith and credit of the United States is pledged to the payment of all guarantees issued under this section with respect to principal and interest.

Further, §1702(g)(1)(B) provides additional support that the full faith and credit is intended and the quantity of that support. It reads in part, "....the Secretary shall pay to the holder of the guarantee the unpaid interest on, and unpaid principal of the obligation as to which the borrower has defaulted, ...".

[1] See attached "Elliott Richardson 10-10-73 memo.pdf

In 6 U.S. Op. Off. Legal Counsel 233, 1982 WL 170672 (O.L.C)[2], the Attorney General opinion on a full faith a credit question recalls an earlier Attorney General opinion in which he says "...If there is statutory authority for the guaranties, absent specific language to the contrary such guaranties would constitute obligations of the United States as fully backed by its faith and credit as would be the case were those terms actually used."

In U.S. Op. Off. Legal Counsel 262, 1982 WL 170697 (O.L.C)[3], the Attorney General says "It has long been the position of the Attorney General that when Congress authorizes a federal agency or officer to incur obligations, those obligations are supported by the full faith and credit of the United States, unless the authorizing statute specifically provides otherwise." He noted a previous opinion that said "Thus, a guaranty by a Government agency contracted pursuant to a congressional grant of authority for constitutional purposes is an obligation fully binding on the United States despite the absence of statutory language expressly pledging its "faith" or "credit" to the redemption of the guaranty and despite the possibility that a future appropriation might be necessary to carry out such redemption." He also said "The presumption that federal agency obligations are supported by the full faith and credit of the United States absent statutory language to the contrary was explicitly declared by the Attorney General in an opinion holding that the Small Business Administration had the authority to guarantee the sale of certain debentures owned by it:" and then repeated the cite above from U.S. Op. Off. Legal Counsel 233, 1982 WL 170672 (O.L.C). He further commented "The presumption favoring full faith and credit support for federal agency obligations rests on a solid foundation of reason and equity. When a federal agency enters the marketplace and lawfully incurs debts, the public which becomes its creditor has a right to expect that, unless notified to the contrary, the agency's obligations will be supported by the government which created it and which considers it a constituent part. Requiring investors to guess the wishes of Congress in this area would be to require them to guess about the key feature this type of investment: the security of government debt obligations. Furthermore, the government's interest in obtaining advantageous credit terms is promoted when the public justifiably assumes that, unless Congress has clearly provided otherwise, federal agency obligations are obligations of the United States government, not merely of the agency supported by its limited assets or periodic appropriations. For these reasons, we believe that when Congress authorizes federal agencies to incur obligations without placing specific restrictions on their backing, it does so in accordance with the presumptions established in the opinions of the Attorney General."

§1702 (c) provides the sole specific limitation that Congress authorized and intended for Title XVII. It reads:

> (c) AMOUNT.—Unless otherwise provided by law, a guarantee by the Secretary **shall not exceed an amount equal to 80 percent of the project cost** of the facility that is the subject of the guarantee, as estimated at the time at which the guarantee is issued.

[2] See attached "6 Op OLC 233 (1982).pdf
[3] See attached "6 Op OLC 262 (1982).pdf

U.S. Op. Off. Legal Counsel 262, 1982 WL 170697 (O.L.C) also expresses, "Although not conclusive, we believe that the maxim expressio unius est exclusion alterius is applicable here." We believe that this important tenet of the interpretation of statutory construction, which means the mention of one thing within the statute implies the exclusion of another thing not so mentioned, is highly relevant to the issue in the instant case as to the both the quality and quantity of the guarantee.

Another example of Congress expressly providing discretion to limit the guarantee can be seen in P.L. 107-42 (Air Transportation Safety and System Stabilization Act)[4]. Sec. 207(2) reads "FEDRAL CREDIT INSTRUMENT – The term "Federal credit instrument" means any guarantee or other pledge by the Board issued under section 101(a)(1) to pledge the full faith and credit of the United States to pay all **or part of any of** the principal of and interest on a loan or other debt obligation issued by an obligor and funded by a lender"

There seems to be very little ambiguity in the statutory understanding of "full faith and credit" either by Congress or by the Attorney General. To suggest that the specific statutory language of §1702 (j) referencing "full faith and credit" with respect to principal and interest can be further limited beyond the specific limiting statutory language of §1702 (c) seems entirely inconsistent with the historical use and understanding of this language. In fact, this would require one to assume that an agency or officer, authorized by Congress to incur an obligation, has the independent authority to determine the quantity of the guarantee different from any specific limiting language. This presumption has been rejected by the Attorney General and was cited in U.S. Op. Off. Legal Counsel 262, 1982 WL 170697 (O.L.C).

Term Sheet - "A Term Sheet is not a loan Guarantee Agreement and imposes no obligation on the Secretary to execute the Loan Guarantee Agreement."

COMMENT: It would seem that if the Applicant fulfills the terms of the Term Sheet that the Secretary would in fact have an obligation to execute the Loan Guarantee Agreement. Otherwise, the Term Sheet and the Conditional Commitment have no contractual meaning.

§609.4 Submission of Pre-Applications.

(d) A financing plan overview describing:

(1) "...the sources of such equity"

[4] See attached "hr2926.pdf"

COMMENT: This may have been viewed as a "general" item, if so, this is not an issue. If it is viewed as a requirement to identify the specific providers of the equity, then it is premature to include this as a requirement. This is because any closing is so far into the future with many unknowns as to terms, conditions, material agreements, etc., that the specific providers are unlikely be fully identified today. This is certainly appropriate later in the process.

(2) "...funding sources of all such debt"

COMMENT: This may have been viewed as a "general" item, if so, this is not an issue. If it is viewed as a requirement to identify the specific holders of the debt, then it is premature to include this as a requirement. This is because any closing is so far into the future with many unknowns as to terms, conditions, material agreements, etc., that the specific holders could not be identified today. This is certainly appropriate later in the process.

(f) A copy of a commitment letter from a Eligible Lender or other Holder expressing its commitment to provide the required debt financing necessary to construct and fully commission the project.

COMMENT: It is premature to include this as a requirement. This is because any closing is so far into the future with many unknowns as to terms, conditions, material agreements, etc., that a commitment letter would have too many conditions that would need to be satisfied as to be not particularly meaningful. We also believe that until there is more certainty around some of these issues, a commitment would be obtained at significant cost. There is ample evidence in prior loan guarantee programs, particularly those with the Air Transportation Stabilization Board, where the premature requirement for commitment letters resulted in the applicant paying up for the commitment but ultimately using another source. This is not to say that funding is not available, but that the optimal source will require more information before making such a commitment. The importance of the optimal source is that it reduces the all-in cost of funding and improves the applicant's ability to meet its obligations in the future, which aligns with the interests of the U.S. Government. This requirement is certainly appropriate later in the process.

(g) A copy of the equity commitment letter(s) from each of the Project Sponsors and a description of the sources for such equity.

COMMENT: It is premature to include this as a requirement. This is because any closing is so far into the future with many unknowns as to terms, conditions, material agreements, etc., that the specific providers of equity would have too many conditions that would need to be satisfied as to be not particularly meaningful. We also believe that until there is more certainty around some of these issues, a commitment would be obtained at significant cost. There is ample evidence in prior loan guarantee programs, particularly those with the Air Transportation Stabilization Board, where the premature requirement for equity commitments resulted in the applicant spending monies unnecessarily and with sponsors that ultimately were replaced by more economical and strategic sponsors. This is not to say that the funding is not available, but that the optimal source will require more information before making such a commitment. The importance of the optimal source of equity is that it brings in the best strategic partner for the applicant, which is potentially useful for the applicant. It will also reduce the applicant's costs and therefore improve the applicant's ability to meet its obligations in the future, which aligns with the interests of the U.S. Government. This requirement is certainly appropriate later in the process.

§609.6 Submission of Applications.

(8), (9), (10), (13), (14), (17), (18), (19), (23), (24), (26)

COMMENT: The requirements presented in the above items numbers request the submission of documents, agreements and information that probably does not exist or known at the time of the application. Many of the requirements would not exist until sometime closer to closing. It would seem more reasonable to require the documents, agreements or information to be disclosed in a commercially timely manner.

§609.7 Programmatic, Technical and Financial Evaluation of Applications.

(b) (9)

COMMENT: While it is certainly within the discretion of the DOE to consider different factors, it would seem that the existence of other forms of Federal or non-Federal governmental assistance should not be viewed as a negative factor. To do so may be inconsistent with the letter or intent of President's Advanced Energy Initiative and the various provisions of EPAct 2005 (Titles II, III, IV, VI, VII, VIII, IX, XIII, and XVII). The qualification for other forms of assistance should also demonstrate the project's viability and influence the project's success, which should be one of the principal concerns of the U.S. Government.

§609.8 Term Sheets and Conditional Commitments.

(c)

COMMENT: It would seem that if the Applicant fulfills the terms of the Conditional Commitment that the Secretary would in fact have an obligation to execute the Loan Guarantee Agreement.

§609.10 Loan Guarantee Agreement.

(d) (3) insert a semi colon";" after "....Project Costs" and delete the remaining text of (d) (3).

COMMENT: The statute says that the guarantee is backed by the full faith and credit of the United States. The deleted text is inconsistent with the statute and numerous Attorney General opinions.

This gets to the meaning of "Full Faith and Credit" which is well established in statute and in numerous U.S. Attorney General opinions. For example, Attorney General Elliott L. Richardson's issued a Memorandum to the Heads of Executive Departments dated October 10, 1973[5] in which he memorializes the Attorney General's opinion on the meaning of "full faith and credit of the United States". The third sentence reads, "More frequently, however, the pledge of full faith and credit is not in doubt and may well be specified in the statute itself." This is the fact in the instant case where Title XVII, §1702(j) reads:

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obligations are supported by the full faith and credit of the United States absent statutory language to the contrary was explicitly declared by the Attorney General in an opinion holding that the Small Business Administration had the authority to guarantee the sale of certain debentures owned by it:" and then repeated the cite above from U.S. Op. Off. Legal Counsel 233, 1982 WL 170672 (O.L.C). He further commented "The presumption favoring full faith and credit support for federal agency obligations rests on a solid foundation of reason and equity. When a federal agency enters the marketplace and lawfully incurs debts, the public which becomes its creditor has a right to expect that, unless notified to the contrary, the agency's obligations will be supported by the government which created it and which considers it a constituent part. Requiring investors to guess the wishes of Congress in this area would be to require them to guess about the key feature this type of investment: the security of government debt obligations. Furthermore, the government's interest in obtaining advantageous credit terms is promoted when the public justifiably assumes that, unless Congress has clearly provided otherwise, federal agency obligations are obligations of the United States government, not merely of the agency supported by its limited assets or periodic appropriations. For these reasons, we believe that when Congress authorizes federal agencies to incur obligations without placing specific restrictions on their backing, it does so in accordance with the presumptions established in the opinions of the Attorney General."

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Another example of Congress expressly providing discretion to limit the guarantee can be seen in P.L. 107-42 (Air Transportation Safety and System Stabilization Act)[8]. Sec. 207(2) reads "FEDRAL CREDIT INSTRUMENT – The term "Federal credit instrument" means any guarantee or other pledge by the Board issued under section 101(a)(1) to pledge the full faith and credit of the United States to pay all **or part of any of** the principal of and interest on a loan or other debt obligation issued by an obligor and funded by a lender"

There seems to be very little ambiguity in the statutory understanding of "full faith and credit" either by Congress or by the Attorney General. To suggest that the specific

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statutory language of §1702 (j) referencing "full faith and credit" with respect to principal and interest can be further limited beyond the specific limiting statutory language of §1702 (c) seems entirely inconsistent with the historical use and understanding of this language. In fact, this would require one to assume that an agency or officer, authorized by Congress to incur an obligation, has the independent authority to determine the quantity of the guarantee different from any specific limiting language. This presumption has been rejected by the Attorney General and was cited in U.S. Op. Off. Legal Counsel 262, 1982 WL 170697 (O.L.C).

(d) (4) Delete in its entirety.

COMMENT: This is inconsistent with a "full faith and credit" guarantee.

(d) (13) Insert "pledged" after "...first lien position on all" and before "assets". Delete "...and other project debt". So the final wording is: "(13) The Guaranteed Obligation is not subordinate to any loan or other debt obligation and is in a first lien position on all pledged assets of the project and all additional collateral pledged as security for the Guaranteed Obligation;"

COMMENT: This clarifies the specific assets that the Secretary has a first lien on consistent with §1702 (g) (2) (b) which reads:

> (B) SUPERIORITY OF RIGHTS.—The rights of the Secretary, with respect to **any property acquired pursuant to a guarantee** or related agreements, shall be superior to the rights of any other person with respect to the property.

The proposed rule could be read to suggest that the Secretary is entitled to all project assets regardless of whether they were pledged or not. This would make any other non-guaranteed financing an unsecured creditor. This is inconsistent with the meaning of the statute and would likely eliminate any other potential financing.

(g) (1) Delete in its entirety.

COMMENT: The requirement of prior notification for assignments, transfers or pledging is unreasonable. Notification for pledging or other use of the Guaranteed Obligation, including any derivative transaction is unreasonable, especially in light of the fact that these kinds of transactions can be necessary for overnight transactions or other circumstances where it is impractical to notify anyone prior to the transaction.

II. Discussion of the Proposed Rule

(F) Financial Structure

"90 Percent Guarantee"

COMMENT: The statute says that the guarantee is backed by the full faith and credit of the United States. The current proposed rule to limit the guarantee to 90 percent of the particular debt instrument is inconsistent with the statute and numerous Attorney General opinions. Please see the previous comments pertaining to §609.2 "Guaranteed Obligation" and §609.10 (d)(3) as to the underlying rationale.

"Pari Passu"

As it relates to a pari passu security structure, we believe that the fundamental rationale that DOE was applying in considering this issue is no longer valid in a structure where the Guaranteed Obligation is 100 percent guaranteed (which is the meaning of "full faith and credit"). §1702 (d)(3) of the statute says:

> "(3) SUBORDINATION.—The obligation shall be subject to the condition that **the obligation is not subordinate to other financing**."

The plain meaning of this is that a pari passu security structure is allowable. If Congress meant for the obligation to be senior to all other financing, it would have said so. §1702 (g)(2)(B), says:

> "(B) SUPERIORITY OF RIGHTS.—The rights of the Secretary, with respect to any property acquired pursuant to a guarantee or related agreements, **shall be superior** to the rights of any other person **with respect to the property**."

This language is consistent with the premise that the Secretary has a first lien position with respect to project assets pledged, or other collateral pledged, to the Guaranteed Obligation. It would not be consistent with the premise that the Secretary has a first lien position in any non-guaranteed financing.

"Stripping"

With respect to the issue of "stripping" and DOE's request for comments pertaining to this, because the statute is clear that the obligation is a 100 percent guarantee, this issue is moot. However, in the interest of providing feedback on the underlying premise of "stripping", we submit the following for your consideration.

1. The DOE website, http://www.lgprogram.energy.gov/FAQs.html, provides answers to frequently asked questions ("FAQ"). It says:

   > "8) Why has DOE required that the guaranteed and non-guaranteed portions of the debt instrument may only be resold on a pro-rata basis?
   >
   > DOE's guidelines state that the Department does not intend to allow "stripping" of the guaranteed portion of the debt instrument from the non-guaranteed portion **for two reasons**. The **first is to preclude** the guaranteed portion of the loan from being sold as a debt instrument fully

guaranteed by the Federal Government in **competition with traditional Federal debt instruments such as Treasury securities.** The **second is to ensure that the Eligible Lender and any subsequent holder of the debt instrument maintain the financial risk in the project that was deemed appropriate when the guarantee was issued so as to ensure continued performance of the due diligence required by the loan documents and the best efforts of the holder to ensure full repayment of the principal and interest of the debt instrument.** In the upcoming Notice of Proposed Rulemaking concerning the Title XVII loan guarantee program, the Department will seek comment on this issue, among many others."

2. The first rationale cited, to preclude competition with Treasury securities, assumes that the two instruments are substitutes for one another. This is simply not true.

    a. Treasury securities represent the most liquid and deep securities in the market, with over $4.8 trillion outstanding and over $500 billion trading each day. Treasury securities trade 22 hours each day.
    b. The daily trading of Federal loan guarantees are not tracked and do not trade in an organized markets. Overall daily trading volumes of loans backed by Federal loan guarantees are not meaningful and do not represent the type of liquidity that investors of Treasury securities seek.
    c. Investors in Treasury securities do not substitute loans backed by Federal loan guarantees for Treasury securities in their portfolios. The principal reasons include:

        i. The lack of liquidity in loans backed by Federal loan guarantees;
        ii. There is no reliable secondary market for loans backed by Federal loan guarantees; whereas many dealers, principally primary dealers, "make markets" in Treasury securities, standing ready to buy and sell Treasury securities at specified prices;
        iii. There is significant prepayment risk associated with loans backed by Federal loan guarantees; whereas since 1985, Treasury has only issued non-callable securities and therefore, investors do not have any prepayment risk with Treasury securities;
        iv. The depth and breadth of maturities associated with Treasury securities are not available with loans backed by Federal loan guarantees;
        v. Treasury securities are used for both investing and hedging purposes, loans backed by Federal loan guarantees are not hedging instruments;
        vi. Treasury securities are exempt from state and local taxation, whereas loans backed by Federal loan guarantees are fully taxable;

vii. Treasury securities are issued on a regular and predictable basis which investors value, whereas loans backed by Federal loan guarantees are quite happenstance;

viii. The terms, conditions, and covenants of loan guarantees are non-standardized which limits their marketability to investors. Treasury securities are highly standardized;

ix. Federal loan guarantees have contained covenants that require mandatory repayments in the event of certain securities issuances by the borrower. While this requirement can protect the U.S. Government, this additional prepayment risk is not something that an investor in Treasury securities seeks;

x. Treasury will frequently reopen existing issuances to increase the size and liquidity of the issuance, which makes them more attractive to investors. This cannot happen with Federal loan guarantees;

xi. The Federal Reserve is a large holder of Treasury securities and Treasury securities constitute an important tool of monetary policy; this is not true of loans backed by Federal loan guarantees;

xii. The default risk of Treasury securities is generally considered to be zero, while loans backed by Federal loan guarantees do in fact default and there is a process to collect on the Federal guarantee itself;

3. The second rationale cited in the FAQ, generally to ensure that the Eligible Lender and any subsequent holder of the debt instrument maintain the financial risk in the project that was deemed appropriate when the guarantee was issued, is not affected by allowing, "stripping".

   The equity investor or lender of any non-guaranteed financing, whether initially or subsequently, makes an independent investment decision on the project and the project sponsor each time the security trades. The fact that there is significant non-guaranteed financing, in this case statutorily at least 20 percent, ensures that the discipline that private market equity or debt investors bring to all of their investments is also brought to bear in a program with the structure of the statutory requirements of Title XVII.

4. The proposal to prevent "stripping", which we believe is moot because of the full faith and credit specifically established in statute under Title XVII §1702(j), would in fact impose additional costs, if it were implemented, on the borrower and the U.S. Government. This is because:

   a. There are investors for Treasury securities, investors for high-grade corporate securities and investors for high-yield corporate securities, but these investors do not look for securities that combine two or more of these elements. This limits the desirability, marketability and liquidity of the loan backed by a Federal loan guarantee.

b. The proposed security, 90 percent guaranteed and 10 non-guaranteed, would require a higher yield than a 100 percent guaranteed security. This means that the interest that the U.S. Government is guaranteeing is higher than they would otherwise be required to do.
c. Additionally, while this is not applicable in the instant case where the initial credit subsidy is paid by the borrower, the credit subsidy required for a mixed security (guaranteed and non-guaranteed) will be higher than a fully guaranteed security, ceteris paribus, because of the higher interest rate required for the underlying loan. This may or may not impact the U.S. Government at each credit subsidy re-estimate.

"Other U.S. Government Support as a Negative Factor"

COMMENT: In general, the idea that there is a negative evaluative factor for applications for Federal loan guarantees based on statutorily approved assistance program, whether tax credits, grants, insurance indemnifications, etc., seems contrary to the intent of the statute and contrary to the President's Advanced Energy Initiative. The statute seems to recognize that various forms of Federal assistance are useful and necessary for developing projects that whose principal goals are to deploy environmentally friendly technology and reducing America's reliance on foreign sources of energy. Further, §1703 (e) specifically says, "A project that receives tax credits for clean coal technology shall not be disqualified from receiving a guarantee under this title." §1704 (b) presents further evidence of Congressional intent supporting multiple types of Federal assistance, saying:

> (b) USE OF OTHER APPROPRIATED FUNDS.—The Department may use amounts awarded under the clean coal power initiative under subtitle A of title IV to carry out the project described in section 1703(c)(1)(C), on the request of the recipient of such award, for a loan guarantee, to the extent that the amounts have not yet been disbursed to, or have been repaid by, the recipient.

There are various forms of Federal assistance provided under Title VI that seem to be intended and necessary, in addition to Federal loan guarantees, to ensure that new nuclear power is developed in the United States. While the first new nuclear generating facility was specifically recognized as a possible exception to the negative evaluative criteria because "multiple forms of federal assistance in the same project could advance important national energy policy priorities", it would seem that the stated national priorities of environmentally friendly generating capacity and the reduction in foreign sources of energy apply beyond this one specific instance. In addition, the statute provides other technologies with other forms of Federal assistance, in addition to Federal loan guarantees. Finally, the existence of, and qualification for, other forms of assistance speaks to the credibility of the project and improves the likelihood of project success. These are certainly in the interests of the U.S. Government as it extends Federal credit.

We hope that our comments and supporting documentation are helpful. We would be pleased to discuss any of these matters, or others, in more detail.

Sincerely,

Michael D. Scott

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